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BUTTE MOTELS, LLC d/b/a BUTTE WAR BONNET HOTEL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BIG SKY HOSPITALITIES, LLC a/b/a
BUTTE WAR BONNET HOTEL,
Respondent,

and

BUTTE HOTELS, LLC & BUTTE MOTELS,
LLC joint employers d/b/a BUTTE WAR
BONNET HOTEL,
Golden State Successor,

and

UNITED HERE! LOCAL 427.

Union.

Cases: 19-CA-33164
19-CA-32165
19-CA-33185
19-CA-65517
19-CA-65566
19-CA-67196
19-CA-67200

**BUTTE HOTELS, LLC & BUTTE MOTELS, LLC MOTION TO STRIKE
RESPONDENT BIG SKY HOSPITALITY, LLC'S OBJECTION, AND/OR BUTTE
HOTELS' RESPONSE TO BIG SKY HOSPITALITY'S OBJECTION**

BUTTE HOTELS, LLC & BUTTE MOTELS, LLC
MOTION TO STRIKE BIG SKY HOSPITALITY,
LLC'S OBJECTION AND RESPONSE ...

BUTTE HOTELS, LLC & BUTTE MOTELS, LLC, d/b/a BUTTE WAR BONNET HOTEL (“BUTTE HOTELS”), by and through its counsel, C. Matthew Andersen and Scott A. Gingras of Winston & Cashatt, hereby Moves to Strike and/or Responds to Big Sky Hospitality, LLC’S (“BIG SKY”) Objection to Butte Hotels’ Response to Motions for Summary Judgment, filed on May 29, 2012.

1. Relief Requested.

Pursuant to the Revised Notice to Show Cause of May 14, 2012, which patently states that “[a]ny briefs or statements regarding this notice will be *accepted only from Butte Hotels*” (emphasis added), Big Sky’s Objection should be struck as an unauthorized and impermissible filing.

Further, regardless of the inappropriateness of Big Sky’s filing, its Objection should not be accepted and/or considered by the Board as it omits and misstates pertinent facts about the procedural history of the case, and because Respondent Big Sky’s improper filing in no way amends, alters, or changes its Amended Answer (or Second Amended Answer) to the Amended Consolidated Complaint. Big Sky did and continues to admit liability to all of the unfair labor practice charges made against Big Sky.

2. Introduction.

This case centers on seven ULP’s; five filed against Respondent Big Sky, and two filed against Respondent Butte Hotels. The hearing date for all seven ULP’s, which were consolidated into one complaint, was set for April 2, 2012. However, before the hearing

occurred, Respondent Butte Hotels and the Acting General Counsel entered into an agreement which conditionally resolved the ULP's filed against it. The agreement predicated Butte Hotels' liability on the outcome of Big Sky's pending ULP regarding its withdrawal of recognition of the Union. After that agreement, however, and without notice to Butte Hotels, Respondent Big Sky filed an Amended Answer to the Consolidated Complaint, admitting the truth of the ULP charges against it, including the unlawfulness of its withdrawal of recognition, negating the need for the hearing.

This Motion to Strike and/or Response accurately sets out the facts of the procedural history which resulted in the filing of the Motions for Summary Judgment, and Butte Hotels' Response.

3. The Accurate Relevant Facts of the Procedural History.

The ULP's filed against Butte Hotels in October of 2011, were allegations of failure to recognize and bargain with the Union, and failure to provide information to the Union that had been requested. The ULP's were filed against Butte Hotels despite the fact that when it purchased the War Bonnet Hotel from Big Sky in September, 2011, Big Sky had made three material written representations to Butte Hotels that: (1) there was no contract with the Union relating to employees employed as housekeepers at the Hotel; (2) there was no legal obligation to recognize the Union as a bargaining unit for employees employed as housekeepers at the Hotel; and (3) thereby there was no legal obligation to engage in collective bargaining with the Union. Based on Butte Hotels' reliance on Big Sky's three material written representations above, Butte Hotels has vigorously denied and defended the ULP's charges made against it.

On or about March 20, 2012, counsel for Butte Hotels, C. Matthew Andersen, and Counsel for the Acting General Counsel for the NLRB, Adam Morrison, participated in a telephone conference to discuss the pending ULP's and the upcoming hearing. Butte Hotels communicated to the Acting General Counsel its analysis and intent on its pending ULP charges. Counsel agreed that if Big Sky's withdrawal of recognition was proper and lawful (as it had been represented to Butte Hotels at the time of sale of the Hotel), then the ULP's filed against Butte Hotels would fail as a matter of law. The parties discussed entering into an agreement and written stipulation to that effect. The stipulation is that Butte Hotels would be bound by the final ruling on Big Sky's withdrawal of recognition ULP charge. This agreement effectively ended the need for Butte Hotels' participation in the pending hearing.

The following day, on March 21, 2012, Counsel for Butte Hotels, C. Matthew Andersen, and Counsel for Big Sky, Cynthia Walker, participated in a telephone conference call. Ms. Walker was advised of the stipulation pending with the Acting General Counsel and the effect of such on the ultimate outcome. Counsel for Big Sky acknowledged Butte Hotels' analysis, and accepted Butte Hotels' position and intent to rely upon Big Sky's defense of the withdrawal of recognition ULP. Immediately thereafter, Butte Hotels began to assist Big Sky with preparation of the defense on the withdrawal of recognition ULP by providing time to interview relevant available witnesses and sending applicable detailed legal research that had been conducted to date.

The following morning, on March 22, 2012, the conditional liability agreement between Butte Hotels and the Acting General Counsel discussed the previous day was made and entered

into during a telephone conference between Mr. Andersen and Mr. Morrison. Butte Hotels and the Acting General Counsel agreed to memorialize the agreement in a written stipulation whereby Butte Hotels would stipulate to be bound by the outcome of Big Sky's ULP's regarding Big Sky's termination of Ms. Angie Sizemore, and whether Big Sky's withdrawal of recognition was lawful.

During the afternoon of March 22, 2012, the Administrative Law Judge assigned to the hearing, Judge Gerald Etchingham, held a telephonic status conference with counsel for the parties. Participating in the call was counsel for Butte Hotels, C. Matthew Andersen, counsel for Big Sky, Cynthia Walker, and counsel for the Acting General Counsel, Adam Morrison. During the conference Butte Hotels put on the record the agreement it had entered into with the Acting General Counsel (that it would abide by the result of the ULP charges against Big Sky for liability, if any, on its ULP charges, and that thereby it was not necessary for Butte Hotels to appear at the hearing). Judge Etchingham thanked the parties for streamlining the hearing so as to reduce the number of trial days. Judge Etchingham excused Butte Hotels from attending the hearing. Mr. Morrison and Ms. Walker represented the number of hearing days necessary, the number of anticipated witnesses, set a beginning time for the hearing and reconfirmed the location. Ms. Walker represented there would be a need to accommodate the schedule of one of her witnesses.

Following the status conference, Butte Hotels continued to provide support to Big Sky on preparing the defense of the withdrawal of recognition issue. This was occurring as Acting General Counsel was preparing the draft of the stipulation for the parties to sign.

The next day, Friday March 23, 2012, Butte Hotels continued to assist Big Sky with its preparation for the hearing by making available its employees, who were potential witnesses to the case, to be interviewed by Big Sky's Counsel. Additionally on that Friday, Butte Hotels sent the Counsel for the Acting General Counsel comments to the draft written stipulation for his review and signature regarding the pre-hearing agreement of contingent resolution of Butte Hotels ULP's.

On the following Monday, March 26, 2012, Butte Hotels received a revised draft of the stipulation back from the Counsel for the Acting General Counsel. The message sent with the revised draft was that most of Butte Hotels' stipulation was substantively agreeable, but that the Acting General Counsel needed to add some additional minor language in the stipulation in order to relieve Butte Hotels and its owner from having to attend the hearing. Also on that day, Butte Hotels continued to communicate and work with Big Sky regarding witness interviews for Big Sky's defense of the withdrawal of recognition ULP.

The next day, Tuesday March 27, 2012, Butte Hotels sent Counsel for the Acting General Counsel a final draft of written stipulation setting forth the agreement for signatures and filing. Counsel for the General Counsel and Butte Hotels also came to a separate agreement to enter into a stipulation concerning jurisdiction of the NLRB to hear the matter.

On the morning of Wednesday, March 28, 2012, Butte Hotels received an e-mail correspondence from Counsel for the Acting General Counsel, Adam Morrison, informing Butte Hotels that late the previous night, Big Sky had filed an Amended Answer to the Amended Consolidated Complaint, admitting all of the charges brought against it. The e-mail provided an

attached copy of Big Sky's Amended Answer. The Amended Answer conceded that the withdrawal of recognition of the Union was unlawful, and that as a result, the duty to continue to recognize and bargain with the Union was required and necessary. This filing was contrary to all previous representations of Big Sky, both before and after the filing of the Complaint.

On March 29, 2012, Big Sky filed a Second Amended Answer, which continued to admit that the allegations of the NLRB against Big Sky were true, and that thereby its withdrawal of recognition was unlawful. Also on March 29th the finalized stipulation of the already entered into agreement between Butte Hotels and the Acting General Counsel concerning the pre-hearing conditional resolution of Butte Hotels' ULP's was signed by the parties. As a result of Big Sky's Amended Answer (and Second Amended Answer) admitting that all of the unfair labor practice charges brought against it were true, the April 2nd hearing was vacated.

On April 16, 2012, due to the fact that Respondent Big Sky's Amended Answer (and Second Amended Answer) conceded all of the ULP charges were valid, and with Butte Hotels liability conditioned on Big Sky's defense of the withdrawal of recognition ULP, there were no issues of fact or law remaining and the Acting General Counsel filed Motions for Summary Judgment with the Board. After a Notice to Show Cause on the Motions for Summary Judgment was issued and served by the Board upon Big Sky on April 19, 2012, Big Sky provided no response to the Motions for Summary Judgment, did not amend its Amended Answer or Second Amended Answer, and did not withdraw its Amended Answer or Second Amended Answer to the Consolidated Complaint.

Butte Hotels was not served with a copy of the April 19th Notice to Show Cause. On May 14, 2012, a Revised Notice to Show Cause was issued, stating in relevant part that:

“[n]otice is given that cause be shown, in writing, filed with the Board in Washington, D.C., on or before May 28, 2012 (with affidavit of service on the parties to this proceeding), why the Acting General Counsel’s Motions should not be granted. Any briefs or statements regarding this notice will be accepted only from Butte Hotels, LLC & Butte Motels, LLC Joint employers d/b/a Butte War Bonnet Hotel.”

On May 23, 2012, Butte Hotels filed its Response of Butte Hotels, LLC & Butte Motels, LLC to Motions for Summary Judgment. On May 29, 2012, Respondent Big Sky filed an Objection to Butte Hotels’ Response to the Motions for Summary Judgment. In its Objection, Big Sky erroneously stated as the basis for its Objection that:

Butte Hotels & Motels entered into the stipulation with full knowledge that BSH had no intention of incurring the expense of a hearing to defend the unfair practice charges against it.

[and ...]

BSH’s amended answers were filed prior to Butte Hotels & Motels entering into a stipulation agreeing to conditionally resolve the unfair labor practice charges pending against it. Thus, Butte Hotels & Motels knew at the time it entered into the stipulation that BSH intended to settle the unfair labor practice charges against it and did not intend to incur the significant expense of defending all charges in a hearing before an administrative law judge.

(See Respondent Big Sky Hospitality’s Objection, pgs. 2-4).

This representation is not correct. Moreover, even in its Objection Big Sky failed to respond to the Acting General Counsel’s facts and representations in its Motions for Summary Judgment that Big Sky withdrew recognition of the Union unlawfully. Big Sky had the time and opportunity to respond to the Acting General Counsel’s factual and legal assertions against it,

which directly contradicts its representations, made to and relied upon by Butte Hotels in entering into the agreement and stipulation with the Acting General Counsel, and Big Sky failed to do so.

4. Motion to Strike Objection, and/or Response to Objection of Butte Hotels.

In this case, in accordance with the original Notice of Show Cause, Respondent Big Sky's time for filing responsive documents had come and passed before it filed its Objection. The Revised Notice to Show Cause, by a plain reading of its language, provided that only Respondent Butte Hotels had the authority of the Board to file any responsive pleadings.

Furthermore, nowhere in Respondent Big Sky's brief does Big Sky assert any argument of good cause based on excusable neglect for its untimely filing. The National Labor Relations Act, Rule 102.111(c) states that briefs must be filed within "a reasonable time" following the deadline "only upon good cause shown based on excusable neglect." If good cause is not shown for an untimely filing, the NLRB routinely grants motions to strike the pleadings. See e.g., Ksl Claremont Resort, Inc. d/b/a Claremont Resort & Spa & Hotel Employees & Rest. Employees Union, Local 2850, Hotel Employees & Rest. Employees Int'l Union, Afl-Cio, 344 NLRB 832 (2005) (wherein the NLRB granted a motion to strike an untimely filed brief, cited "strict compliance" with Rule 102.111(c), and held that any party seeking to file an untimely pleading must file a motion stating the ground of "excusable neglect" upon which it relies for requesting permission to file untimely). As a result, with no authorization and/or authority to file said Objection, and no good cause shown for its late filing, "Respondent Big Sky Hospitality's

Objection to Response of Butte Hotels, LLC & Butte Motels, LLC to Motions for Summary Judgment” should be struck.

Irrespective of the lack of authority to file its Objection pleading, Respondent Big Sky consistently has set forth inaccurate and misleading facts of the procedural history of this case as the basis for its objection to Butte Hotels’ Response; therefore, it should be disregarded by the Board. First, at the time Butte Hotels entered into the agreement and stipulation with the Acting General Counsel to conditionally resolve its ULP’s, Butte Hotels had no knowledge that Big Sky “intended to settle the unfair labor practice charges against it and did not intend to incur the significant expense of defending all charges in a hearing.” There is no evidence of this false statement of fact. In reality, it makes no practical sense (and is completely an unreasonable assertion) that Butte Hotels would enter into such an agreement and stipulation to conditionally risk its liability on a defense which had already been withdrawn.

Second, as provided above, in fact it was Big Sky who was the party that knew, prior to filing its Amended Answer, what Butte Hotels’ position and intent was in regards to its pending ULPs. Big Sky’s recitation of the alleged facts and procedure history is simply false or misleading and should not be considered. The true and accurate chronological summation of events leading up the vacated hearing and Motions for Summary Judgment is: (1) Butte Hotels entered into an agreement to conditionally resolve its ULPs and rely upon Big Sky’s defense of the withdrawal of recognition representations it had made; (2) Butte Hotels then notified Big Sky and the Administrative Law Judge of the agreement to rely and allow its liability, if any, to be based on whether Big Sky’s withdrawal of recognition was lawful; (3) Butte Hotels then began

to draft a memorializing written stipulation of the agreement, while at the same time helping and assisting Big Sky with its defense of the recognition ULP; and (4) after notice to all parties of the agreement, while supporting Big Sky in its defense, and while finalizing the written stipulation of the agreement, Respondent Big Sky filed an Amended Answer (and a Second Amended Answer) admitting the ULP allegations against it were true.

5. Conclusion.

For the foregoing reasons, Respondent Big Sky's Objection to the Response of Butte Hotels to the Motions for Summary Judgment should be struck as a violation of the Board's order, or, in the alternative, it should not be accepted and/or considered by the Board for its false and misleading statements of facts and procedural history.

DATED this 20th day of June, 2012.



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STATEMENT OF SERVICE

I hereby certify that a true and correct copy of the BUTTE HOTELS, LLC & BUTTE MOTELS, LLC MOTION TO STRIKE RESPONDENT BIG SKY HOSPITALITY, LLC'S OBJECTION, AND/OR BUTTE HOTEL'S RESPONSE TO BIG SKY HOSPITALITY'S OBJECTION was served on the 20th day of June, 2012 by serving the following parties in the manner indicated in conformity with NLRB Rule 102.114(a):

Cynthia L. Walker Poore, Roth & Robinson, P.C. 1341 Harrison Avenue P.O. Box 2000 Butte, MT 59702 Telephone: 406-497-1200 Fax: 406-782-0043 Email: clw@prrlaw.com Attorney for Virginia Karlsen	VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA FEDERAL EXPRESS <input type="checkbox"/> VIA EMAIL <input checked="" type="checkbox"/>
Mark Anderlik Unite-Here Union Local 427, AFL-CIO 208 East Main Street Missoula, MT 59802 Telephone: 406-549-5931 x 4 Fax: 406-549-6346 Email: manderlik@igc.org	VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA FEDERAL EXPRESS <input type="checkbox"/> VIA EMAIL <input checked="" type="checkbox"/>

E-File:

Office of Executive Secretary
Washington, D.C.


Cheryl L. Krengel
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